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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENT J. VIGIL,

Defendant and Appellant.

B213930

(Los Angeles County  
Super. Ct. No. BA 336720)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Carol H. Rehm, Jr., Judge. Affirmed as modified.

Linda Acaldo, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, David C.  
Cook and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Vincent J. Vigil timely appealed from his convictions for misdemeanor assault (count 1), felony assault with a deadly weapon (count 3) and two counts of corporal injury to a spouse (counts 2 & 4). The jury found true the allegation defendant personally used a deadly and dangerous weapon, i.e., a box cutter, on count 4. The jury found not true the allegations defendant personally inflicted great bodily injury on count 3. The court found true prior conviction allegations. The court exercised its discretion and struck one of defendant's strike-priors and sentenced him to a total of 23 years and 8 months. Defendant raises several issues, including his contentions he was denied the effective assistance of counsel because his counsel failed to object to several instances of improperly admitted evidence and the prosecutor engaged in misconduct throughout the trial. We affirm as modified.

## **FACTUAL BACKGROUND**

### **I. Prosecution Case**

#### **A. Counts 1 & 2 (December 2006 crimes)**

Adelita Telles and appellant dated for approximately two years and lived together sometime during that time.

During December 2006, Irene Tragaro, who lived in an apartment in Burbank, was dating Tommy Philips, Telles's former boyfriend and the father of Telles's two children. Telles had always treated Tragaro badly and had threatened to assault Tragaro on multiple occasions. Once, Telles came at Tragaro with a stick, but Telles was disarmed by someone else. Tragaro had met appellant on two occasions.

On December 26, Tragaro came home around 5 p.m. Telles knocked on Tragaro's door a few minutes later, lifted her sunglasses and displayed a blackened eye, and asked if she could stay at Tragaro's apartment because that "would be the last place that [appellant] would know where I am at." Telles said appellant had caused her injuries. Tragaro called the police. Tragaro saw other injuries on Telles's left side, "front to side."

Freddie Opinaldo, who was a police officer at the time, responded to Tragaro's apartment. Telles's left eye was discolored, "bruised, purple in color," and swollen. Both eyes were "covered" by Telles's "shiner." Telles complained of back pain on her left side, which was bruised and lacerated. Telles explained her boyfriend had been drinking for two days, and when she asked him to stop, he responded by saying she should "shut [her] smart mouth," and then swung at her with a closed fist. Telles tried to defend herself, but appellant overpowered her and became more angry. Appellant said, "Oh, you fucked up bitch," and started hitting her multiple times on the body with a closed fist. Telles did not call the police sooner because appellant was with her. When appellant went to work the next day, he said he would hunt her down if she left. Telles did leave and went to Tragaro's house.

On December 27, Detective Edward Wilson received a phone call from Telles, who wanted to know the status of her report and to tell him of an incident that had occurred on Christmas Eve, which she had forgotten to mention because she was upset and frightened, in which appellant struck her on the back with a hammer. Telles said she thought the police might have let slip she was staying in Burbank, and as a result, she would have to change locations. Telles feared appellant would kill her. Telles met with Wilson on January 10, 2007. Telles appeared to be "nervous" and said she had caught appellant having sex in his car, became angry, and then made up the story about him assaulting her. The woman appellant was with inflicted the injuries on Telles. Telles said everything was fine and the police should drop the matter. Telles refused to identify a photo of appellant and did not appear to be convincing to Wilson.

Telles testified she did not recall receiving any injuries during Christmas 2006; she went to Tragaro's house on December 26 because she "needed to get away," to get a "break from home," but nothing had happened on Christmas Day to make her leave home. Telles did not recall having a "big black eye" or a bruise on her back, and did not recall whether someone had beaten her on December 25. To Telles's knowledge, appellant had never punched or kicked her or pulled her hair.

Telles stated the police went to Tragaro's house because Tragaro had called them. Telles did not recall speaking to the officers or telling them that appellant had been drinking for two days, became angry, told her to shut her "smart mouth," etc. Telles did not want anyone to find her at Tragaro's because she needed to "get away" from the stress of family life, "personal issues we were going through," "every day life."

Telles also did not recall speaking with a Detective Wilson or saying that she forgot to tell him about an incident that occurred on December 24, when appellant had hit her with a hammer, she caught appellant having sex with another woman, etc. In response to the prosecutor's question of whether Telles wanted to tell him more than she was testifying to, she responded, "I have nothing to say."

#### **B. Counts 3 & 4 (February 2008 crimes)**

On February 18, 2008, Dr. Thuc Bach treated Telles at the Huntington Memorial Hospital for a six-inch, superficial, "bleeding" cut that was "very clean" and "very precise" and that was probably delivered in a "straight slashing action." The cut was closed with sutures. Telles's blood alcohol level was ".2"

When Officer Francisco Serrano responded to appellant's house for a "victim that was cut" call, neither appellant nor Telles was there. Serrano went to the hospital, but he did not see appellant there. Telles said that she did not want to talk to the police about her injury and that she afraid of the person (appellant) who hurt her because he was an Avenues Gang member. Telles appeared to be very scared. Telles recognized Serrano from when he and his partner had responded to Tragaro's apartment and began talking about how she had been cut. Telles was with appellant who accused her of dating and having sex with someone from the Frog Town gang in Atwater Village. Appellant produced a silver box cutter and cut Telles on her upper torso; she screamed for help; and someone called 9-1-1.

Telles testified that on February 18, she was at the King Edwards bar in Downtown Los Angeles with appellant and two friends. The group left the bar after a few hours, around 9 or 10 p.m. Telles was supposed to work that evening at U.P.S. but did not go because she received the injury to her neck. Telles did not remember how she was injured because she was drunk. Telles did not recall arguing with anyone before she was injured, whether she had any fights with appellant, whether he had cut her, whether she spoke to any police officers at the hospital, or whether she told any police officers that she did not want to talk to anyone because she was afraid of appellant. Telles would not tell the prosecutor what had happened that caused the cut on her neck and denied going after appellant with a knife. Telles displayed the scar from her injury and a photo was introduced depicting her injury the day after she came home from the hospital.

### **C. Additional Evidence of Telles's Fear of Appellant**

On February 20, Detective Adrienne Hamilton showed Telles a photo of appellant; Telles said appellant was the right person, but she refused to sign the photo. Telles said she would not help with the investigation, that she feared appellant because of his gang affiliation and because of his personal characteristics, that she heard she "was a rat" because she had testified at the preliminary hearing, and that appellant would become violent when he drank. In a meeting with Hamilton and the prosecutor before trial, Telles would not admit appellant cut her, but explained that appellant, who was intoxicated, accused her of having an affair with a rival gang member who lived near her and appellant.

Telles testified she was "not really" afraid of appellant, but might have previously told the prosecutor that she was. Telles did not recall telling the prosecutor she was fearful of appellant due to his gang affiliation, that she wished she could tell them "everything," that she might have to answer questions by saying, "I don't recall" or that she responded, "you just don't know how much I want to tell you guys everything" when

asked if she would tell the truth. Telles denied the other statements attributed to her by Hamilton.

Telles pled no contest to a battery charge in 2003. Telles had been arrested for fighting in 1997 and again in 2000. One of those incidents involved Tommy Philips, the father of her children. The parties stipulated Philips had accused Telles of cheating on him, they argued, and she repeatedly assaulted him. None of the incidents involved weapons, which Telles stated she had never used on anyone.

#### **D. Appellant's Uncharged 1993 Assault on Olivia Vigil**

Olivia, who was married to appellant from 1983 through 1993, did not want to testify, but did so under compulsion of subpoena and threat of arrest. When intoxicated, appellant would become argumentative and sometimes violent. On April 17, 1993, Olivia returned home from work; appellant, their children, Olivia's two sisters and her niece were there. Appellant was very intoxicated and angry because Olivia was late. Olivia said she did not want to fight and needed to take her sisters home, return and go to bed as she had to work the next day. Appellant did not want Olivia to drive her sisters home and told them they "needed to get the fuck out of here." The sisters left. Appellant yelled and cursed at Olivia, who said he should stop drinking because he became a "different person."

Appellant pushed Olivia onto the couch, stood in front of her, and then slapped her. Olivia told appellant she wanted him to leave, and she "didn't want this anymore." Appellant said if he could not have her, no one else would. Olivia "guessed" appellant slapped her again. Olivia tried to push appellant off of her. Appellant pulled her hair, which was very long; her head felt hot and her hair wet. Olivia was cut on the top of her head. Olivia, who did not remember if she sustained other injuries, realized she had been injured and saw a small steak knife in appellant's hand. Appellant said he was sorry and

did not mean to hurt her. Appellant helped wash the wound. The police came, arrested appellant and recovered the knife. The wound required sutures.

Olivia believed appellant to be a truthful person who had changed since that incident; she did not fear him, and he was welcome in her home. Olivia based her opinion on five visits of approximately 10 minutes each and five visits of an hour or less in the presence of his mother and family. After 1993, Olivia spoke on the phone with appellant approximately 10 times. Olivia did not know appellant had been convicted in 1998 of spousal abuse. Olivia was aware appellant had been convicted of manslaughter in 1983 and had taken that conviction into account. In response to the question of whether she was aware of any probation or parole violations by appellant since 1993, Olivia responded he was a changed person as to her and her family and outside of that, she had no knowledge.

#### **E. Appellant's Uncharged 1998 Assault on Febe Carranza Baca**

On May 2, 1998, Elva Cardenas<sup>1</sup> heard screaming outside of her house. Cardenas looked and saw a male Hispanic yelling at Baca on the porch of a house across the street on Meridian Street. Appellant grabbed Baca by the hair and struck her several times on the head. Baca broke free and ran from the front porch crying and screaming, chased by her attacker, who caught her, grabbed her by the hair, pulled her to the ground, slammed her head on the sidewalk, said, “Get up you bitch,” and then pulled her to her feet by her hair. Cardenas called 9-1-1.

Officer David Aikins and his partner responded to the Meridian address. Baca, bearing a large contusion on her forehead and crying, was there with appellant, whom she said was her live-in boyfriend. Baca said she and appellant had argued, she walked outside, appellant grabbed her, they struggled and she fell and hit her head on the

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<sup>1</sup> Cardenas did not testify at trial; the parties stipulated as to what she would have said, but not to the truth of that testimony.

sidewalk; her arms were bruised. Baca said she was very scared and just wanted to leave, she did not want appellant, who was on parole, to be prosecuted. Baca said she feared retaliation from appellant and, ““You don’t understand. These people . . . can have you killed.”” Baca said appellant belonged to the Avenues, which Aikins knew to be a local gang. Baca appeared to be scared to Aikins. While at the courthouse for that incident, Baca was very upset with Aikins and screamed at him because she did not want to testify.

Baca testified she had never been around Meridian Street where something happened to her and did not recall the police entering a house where she was with appellant. Baca was friends with appellant and his mother and was not afraid to testify. Baca denied having received a bump on her head, arguing with appellant or telling the police she feared appellant or that he belonged to a gang. Baca was angry about being compelled to testify. Appellant was never violent, aggressive or physical with her and had never pushed, punched or slapped her. Appellant never grabbed Baca by the hair, slammed her head against the sidewalk or called her a bitch.

## **II. Defense Case**

Based on his review of medical records, Dr. Barry Silverman understood that the laceration to Telles’s neck was “superficial” and not serious. A person with a .206 blood alcohol level would be “diminished in judgment and skill.”

Virginia Caldera testified she had known appellant for about six years and thought he was truthful and reliable. Appellant would take Caldera to the store and was punctual; she was comfortable letting him care for her children. Appellant had never broken any agreements with her and did not appear to have contacts with gang members. Caldera thought appellant was a “good,” “very loveable, wonderful man.” Caldera had never seen appellant lose his temper, become violent, or within the two years prior to February 18, 2008, have anything to drink. Caldera had only seen appellant once in the last two years. Caldera was not aware appellant had been arrested for possession of



methamphetamine in April 2006. That information would change Caldera's opinion appellant was a clean, honest and sober person.

James Parra testified he was an employment counselor at Homeboy Industries. Parra was a trained gang intervention specialist. In his capacity as employment counselor, Parra had interviewed appellant and provided employment services and case management to appellant. Appellant had demonstrated to Parra that he was reliable, truthful and honest.

Theresa Olivas testified that previously, she had dated appellant's deceased brother and known appellant for around six years. Olivas found appellant to be reliable and honest. Olivas also knew Telles, whom Olivas thought to be dishonest, irritating, obnoxious, wild and loud. On one occasion, the police found methamphetamine that Telles left in appellant's coat pocket, and Telles let him take "the rap." On another occasion, Olivas went to the police with Telles after Telles had filed a complaint about appellant hitting her; Telles wanted to tell the police that she had lied because she was angry at appellant. On another occasion, Telles became upset when she discovered photos of appellant's ex-girlfriend.

Appellant's brother John testified appellant, who had been involved in gangs when younger, had always discouraged him from being involved in gangs so John would follow a better path than appellant had. John had his own maintenance company, and in 2005, after appellant had started to mature, he went to work for John and was trustworthy, truthful, honest and responsible. Appellant became involved in a community church program that helped people live sober lives. Even in the "old days," appellant had a "street" reputation for being tough but honest. John thought Telles was untruthful and dishonest.

Appellant testified that a lot of things about his past that had come out in the trial were true, but he had changed. Appellant had improved himself and helped others through Homeboy Industries. There were instances in which Telles demonstrated she was not honest and truthful. Appellant had been convicted of drug possession in 2006

because Telles had surreptitiously put her methamphetamine in his pocket. Appellant had cut Olivia on the head with a knife, but he was drunk and felt badly about it afterwards. Appellant had hit Baca in the past. Appellant denied striking Telles with a hammer or with his fist in December 2006.

On February 18, 2008, Telles was drinking and possibly using drugs. Telles wanted to visit a friend at a bar. Appellant did not want to do so because Telles would get “ticked off” when she drank, leading to her “cuss, talk shit,” and because she had to work later. Telles always carried the box cutters she used for work. Appellant did not have a box cutter. They went to the King Edwards bar with Celia and Monica; appellant did not drink there. Telles drank a lot, became loud, cursed and acted up. Telles pushed a woman who spoke to appellant against the bar. The bartender told appellant and Telles to leave. Monica needed a ride to Highland Park to collect \$700 someone owed her. While driving there, Telles, who was upset, wanted to stop at another bar.

They reached the location where Monica wanted to collect her money. To calm Telles down, appellant said he would take her to a bar after Monica got her money. Telles got out of the car and walked down a long alley. Appellant followed, but Telles lunged at him with a box cutter. Appellant grabbed Telles’s arm and pushed her against the fence; Telles was cut accidentally. Telles refused to go to the hospital. Appellant walked back to the car, then drove to where Telles had been, but she was gone.

Telles would not spend the Christmas holidays with appellant; she would go away from Christmas to New Year’s Eve, and then return after New Year’s Day. Appellant denied admitting to police he was a gang member. Appellant had previously belonged to a gang, but had stopped his active involvement 20 years earlier. Appellant stated he had “belonged to a gang,” but “was never a gangster.”

## **DISCUSSION**

### **I. Gang Evidence**

Appellant contends the court erred by permitting several witnesses to testify about his gang affiliation as those references were more prejudicial than probative and had no legitimate use because domestic violence crimes are personal and his motive had nothing to do with gangs. Moreover, appellant claims the prosecutor sandbagged him by failing to follow the law and ask the court's permission to introduce that evidence but instead waited until the witnesses were on the stand in order to prejudice the jury. Appellant states that although the evidence could have been used to attack his credibility if the court had scrutinized it, the prosecutor did not argue credibility but rather emphasized the violent nature of gang acts in his opening and closing argument. Appellant suggests the witnesses could have testified they feared him because of his behavior and it was not necessary to refer to his gang affiliation.

Officer Aikins testified that when he responded to Meridian Street, Baca told him that she feared retaliation from appellant related to his gang involvement. At trial, Baca testified she did not recall the incident or that statement. Officer Serrano testified that when he responded to Huntington Hospital, Telles told him she did not want to talk to the police, she was afraid of appellant because of his gang involvement and appellant had accused her of having sex with a rival gang member and then cut her with a box cutter. Detective Hamilton testified Telles said she feared appellant because of his gang affiliation and his personal characteristics and appellant had accused her of having an affair with a rival gang member. At trial, Telles testified she did not recall those statements and was "not really" afraid of appellant.

"The abuse of discretion standard of review applies to any trial court ruling on the admissibility of evidence." (*People v. Hoyos* (2007) 41 Cal.4th 872, 898.)

## **A. Background**

### **1. Pretrial Proceedings**

The court ruled the prosecutor could introduce evidence of appellant's prior convictions for his 1998 attack on Baca and his 1993 attack on Olivia. The prosecutor had sought to introduce the priors to show appellant's unbroken chain of violent criminal activity against women. Defense counsel told the court the defense would be appellant was a changed man, had become a good person who "wishes to rehabilitate youngsters who are seeking the past that he at one time sought" and there was no willing victim as the victim (Telles) had recanted her accusations, had a motive to make a false complaint and did not really fear appellant because she stayed with him after the first incident.

### **2. Opening Statements**

The prosecutor noted appellant would try and show he was a changed man and his past should not be held against him, that Baca and Olivia did not want to testify and had to be compelled to testify, and that Telles, who also did not want to testify, told him she was scared. "I can tell you she fears him. I can tell you she knows about his prior history of gangs, so I don't know what she is going to say." Even though Telles told the prosecutor that appellant had a knife and slit her throat when they argued about her sleeping with a rival gang member, she would probably claim a lack of memory when testifying.

Noting that appellant was being tried for his current offenses, not his past offenses, and that appellant had "a very unpleasant past," defense counsel argued appellant was a "changed man" and Telles was lying. Counsel explained appellant would likely testify:

In so doing he opens the door to more of his past. He is taking that risk to be the only person to give you the honest truth in this case and he is going to do it. He is going to take that risk, but I have inquired of you, that it is hoped that each and every one of you will be able to separate the man now in 2006 and 2008 from that man back then. He has paid a price for his past. He made a turning point in his life. He reached that point where he said, I don't like that anymore.

In arguing appellant should not be judged by his past, defense counsel noted appellant had acted in self defense when he cut Telles, Telles was not afraid of appellant, Olivia had a good relationship with appellant, and other witnesses would testify about his good character.

### **3. Closing Arguments**

The prosecutor stated the case was not about whether appellant was a bad person and the jury should not convict appellant based on his past. With regard to change, the prosecutor noted appellant had not removed his gang tattoos as required by Homeboy Industries and emphasized Telles's fear of appellant and tied that fear to appellant's gang membership. The prosecutor noted that what had precipitated appellant's cutting Baca's throat was her sleeping with a member of a rival gang. The prosecutor equated appellant's claim he was not a gangster with his claim he was largely a victim of circumstances.

Defense counsel emphasized appellant was a changed man, Olivia and Baca were on good terms with appellant, and Telles, who was a liar, was not afraid of appellant but felt badly because she had caused him so much trouble. Counsel noted that as part of appellant's efforts to change, he wanted to become a gang counselor and that although appellant might have once been a gang member, he no longer was.

In rebuttal, the prosecutor again argued appellant was not a changed person and that Telles feared appellant because he was a gang member. The prosecutor explained:

The only reason you are hearing this gang evidence and the only reason you should really consider it, not just because he is a bad person, but to show why people would be scared of him, to show why [Baca] would come in here and say, I have never called the police on [appellant]. They have never even taken a police report. [¶] Because he is a gang member.

## **B. Relevance**

In the instant case, there was no gang expert and no testimony about gangs (e.g., how they operated, how they were composed, what crimes they committed, or their culture), the only gang evidence was the statements to police made by Telles and Baca to the effect they feared appellant because of his gang affiliation and Telles's statements that the second incident was preceded by appellant's accusing her of sleeping with a member of a rival gang.

“Evidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible.” (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.) “Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible.” (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449-1450; see also *People v. Ayala* (2000) 23 Cal.4th 225, 276-277.) Evidence of a defendant's gang membership may be relevant to motive. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Thus, the evidence the witnesses feared appellant because he was a gang member was relevant to their credibility (and to his motive for the February crimes). That fear helps explain why the witnesses did not want to testify and did not testify in accordance with their statements to the police and why Baca did not want appellant to be prosecuted. The fact other witnesses feared appellant bolstered Olivia's credibility. Accordingly, the court did not err by permitting the gang evidence.

### C. Ruling

At a hearing outside the presence of the jury after Officer Aikins testified Baca had told him she feared retaliation and appellant was a gang member, defense counsel stated he had not found it necessary to retain a gang expert “because the gang issues . . . are minimal.”

When the prosecutor asked Telles whether she had told the prosecutor and Detective Hamilton that she feared appellant due to his gang, defense counsel objected to the question as leading and “just 352.” The court overruled the objection, but cautioned the prosecutor to not “make this trial a gang trial,” and that “if it gets too far,” the court would sustain “352 objections.” Other than this instance, defense counsel did not object to the gang evidence. The California Supreme Court has “‘consistently held that the “defendant’s failure to make a timely and specific objection” on the ground asserted on appeal makes that ground not cognizable.’” (*People v. Partida* (2005) 37 Cal.4th 428, 434; see also *People v. Thornton* (2007) 41 Cal.4th 391, 427 [forfeiture also applies to claims of constitutional error].)

It is clear that defense counsel was aware evidence of appellant’s gang membership would be adduced at trial, but other than the one instance, chose not to object to the subsequent references because appellant’s defense was that he was a changed man. Thus, appellant’s claim he was sandbagged by the gang evidence is disingenuous.

Appellant cites no authority for his position that a prosecutor must seek the court’s permission before adducing gang evidence or that the court must rule on an objection never made. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303, fn. 22.) As a matter of fact *People v. Williams* (1997) 16 Cal.4th 153, 193, the case cited by appellant for the proposition the court must carefully scrutinize gang evidence, involved the denial of a defendant’s motion to exclude gang evidence.

Appellant suggests the facts in *People v. Albarran* (2007) 149 Cal.App.4th 214 are similar to those here but less prejudicial. Appellant is mistaken. In *Albarran*, this court reversed the judgment due to the nature and amount of gang evidence, the number of witnesses who testified to the defendant's gang affiliation and the role the gang evidence played in the prosecutor's argument. (*Id.*, at p. 232.) There was "a panoply of incriminating gang evidence" of the kind generally presented when a gang enhancement is alleged, and the prosecutor argued the motive for the shooting was to gain and enhance the shooter's reputation within the gang. (*Id.*, at p. 227.) No such gang evidence was adduced in the case at bar. The prosecutor only argued appellant's motive for one incident was his belief Telles had slept with a member of a rival gang, not to enhance his status within a gang. The prosecutor emphasized the fact appellant's being a gang member was only to be considered in terms of assessing witness credibility. A fair reading of the prosecutor's arguments is that appellant's gang membership was relevant to witness credibility and he did not discuss the violent nature of gang acts, only of appellant's acts.

The gang evidence was probative on the issue of witness credibility, especially given the witness's recantations and claims of inability to recall, and not unduly prejudicial given his defense he was a changed man. Thus, even if the court had been called upon to scrutinize this evidence, we conclude it would have overruled any objections.

## **II. Juvenile Adjudication and Arrest**

Appellant contends the court erred by permitting him to be impeached with a 1978 juvenile adjudication and a 1978 juvenile arrest because a juvenile adjudication is not a felony conviction. Admission of an uncharged offense being "essentially a determination of relevance, is reviewed for abuse of discretion." (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)



## **A. Background**

During appellant's direct testimony, he told the jury about being stopped by the police who questioned him about a car (apparently stolen) that had been left in an alley by the house of a friend where appellant was visiting. The police questioned appellant about his gang membership. Appellant told the police he did not know anything about the car and they could check his "jacket" because he had "nothing on my record for stealing vehicles."

On cross-examination, the prosecutor asked appellant if he was sure there was nothing in his jacket about taking a car. Appellant said maybe there was, from when he was 12 years old. The prosecutor asked if maybe it occurred when appellant was 14 years of age, and maybe on more than one occasion. Appellant admitted having taken a Volkswagen and a motorcycle. When the prosecutor challenged appellant about whether he was being entirely truthful when he told the officers there was nothing in his jacket for car theft, appellant responded "[i]t might have passed me by, but I was a kid when I did that." Defense counsel then objected to the testimony about juvenile matters because they were not criminal convictions and because he thought appellant might have misunderstood the question. The court overruled the objection on the basis the prosecutor had asked about arrests not convictions.

## **B. Impeachment**

Generally, "under California law a juvenile court adjudication is not considered an impeaching conviction." (*People v. Jackson* (1980) 28 Cal.3d 264, 311 disapproved on another point in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3; see also *In re Joseph B.* (1983) 34 Cal.3d 952, 955 [""[A]djudications of juvenile wrongdoing are not "criminal convictions."""].)

“When a defendant voluntarily testifies, the district attorney may fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them.” (*People v. Cooper* (1991) 53 Cal.3d 771, 822.)

“[A]lthough “evidence of a specific instance of a witness’ conduct is inadmissible under Evidence Code section 787 to impeach the witness as proof of a trait of his character [it] may become admissible to impeach the witness pursuant to Evidence Code section 780, subdivision (i), by proving false some portion of his testimony.” [¶] Thus, a witness who makes a sweeping statement on direct or cross-examination may open the door to use of otherwise inadmissible evidence of prior misconduct for the purpose of contradicting such testimony.” (Citations & italics omitted.) (Cf. *Andrews v. City and County of San Francisco* (1988) 205 Cal.App.3d 938, 946.)

Similarly, appellant’s references to his “jacket” were not questioned to prove a character trait, but to contradict his statement there was nothing in his jacket about stealing cars. (See *People v. Cooks* (1983) 141 Cal.App.3d 224, 324 [rejecting a claim the court erred in allowing the prosecutor to impeach the defendant’s credibility with a prior misdemeanor conviction].) Thus, as appellant opened the door, the court did not abuse its discretion in overruling his objection.

Appellant posits that if the prosecutor had requested an Evidence Code section 352 ruling, the court would not have permitted use of the 1978 juvenile adjudication and arrest on the ground they were too remote (as the court had determined with respect to a 1987 prior conviction). Appellant failed to object on that basis. (*People v. Partida*, *supra*, 37 Cal.4th at p. 434.) Even if he had, given the purpose to contradict appellant’s testimony there was nothing in his jacket about stealing cars when there was something to that effect, remoteness was not relevant and not permitting the cross-examination would have allowed appellant to mislead the jury. (See *People v. Robinson* (1997) 53 Cal.App.4th 270, 282-283.)

### **III. Uncharged Acts**

Appellant contends the court erred by permitting the prosecutor to tell the jury about other uncharged acts. The uncharged acts cited by appellant are: the prosecutor told the jury appellant had been on parole and suggested he had suffered probation and parole violations; the prosecutor asked a witness if he knew appellant had been convicted of killing someone after representing he was not going into appellant's manslaughter conviction; and the prosecutor referred to appellant's prior conviction for assault with a deadly weapon without first requesting permission to do so.

#### **A. Background**

Officer Aikins testified that when he talked to Baca, she stated she injured herself by falling, she feared retaliation from appellant who was a gang member, and she did not want appellant, who was on parole, to be prosecuted. Appellant did not object to that testimony.

During Olivia's cross-examination, in challenging her opinion of appellant's good character, the prosecutor asked whether Olivia knew appellant had been convicted of killing someone. Defense counsel objected. At a sidebar, the court struck the question, and all parties agreed the prosecutor could say "manslaughter" instead. The prosecutor then asked Olivia whether she knew appellant had been convicted of manslaughter in 1983 and whether she had considered that fact in forming her opinion. Olivia responded she was aware of and took that fact into account. In response to the question of whether Olivia was aware of any probation or parole violations by appellant since 1993, she responded he was a changed person, and outside of that, she had "no knowledge."

While cross-examining appellant, the prosecutor asked appellant if he was a convicted felon. Then, among other specific prior convictions he presented to appellant

for a yes or no answer, the prosecutor asked whether appellant had been convicted on August 16, 1993, of assault with a deadly weapon. Without objection, appellant responded he had.

## **B. Other Uncharged Acts**

“It is well established that, “[w]hen a defense witness, other than the defendant himself, has testified to the reputation of the accused, the prosecution may inquire of the witness whether he has heard of acts or conduct by the defendant inconsistent with the witness’ testimony.” So long as the People have a good faith belief that the acts or conduct about which they wish to inquire actually took place, they may so inquire.’ The same principles apply when a witness gives character testimony.” (Citations omitted.) (*People v. Ramos* (1997) 15 Cal.4th 1133, 1173.)

Other than the reference to killing someone, appellant did not object to protested uncharged acts evidence. Along with the evidence Baca feared appellant because he was a gang member, the fact appellant was on parole helps explain why Baca did not want him prosecuted. The brief question about possible parole and probation violations was to counter Olivia’s testimony about appellant’s good character and did not elicit a positive response. Even if the 1993 conviction was not the same one the court had ruled could be admitted under Evidence Code sections 1101, subdivision (b) and 1109, assault with a deadly weapon is a crime of moral turpitude and admissible under those sections. (*People v. Cavazos* (1985) 172 Cal.App.3d 589, 595.)

Thus, the challenged other acts evidence was properly admitted.

Having determined the gang evidence, the juvenile adjudication and arrest, and the other uncharged acts were all properly admitted, there was no cumulative error as argued by appellant.

#### **IV. Prosecutorial Misconduct and Ineffective Assistance of Counsel**

##### **A. Misconduct**

Appellant contends reversal of his convictions is required because there was pervasive prosecutorial misconduct at trial. Appellant basically recasts his previous complaints as examples of misconduct.

“‘In general, a prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury.’ The defendant generally need not show that the prosecutor acted in bad faith or with appreciation of the wrongfulness of his or her conduct, because the prosecutor’s conduct is evaluated in accordance with an objective standard. ‘To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.’” (Citations omitted.) (*People v. Bradford* (1997) 15 Cal.4th 1229, 1333.)

Appellant made no objection to any alleged prosecutorial misconduct at trial. We disagree with his suggestion he did not need to object because an admonition would not have cured the harm. Moreover, we have already determined the allegedly improperly admitted evidence was properly admitted. We find no pattern of deceptive or reprehensible conduct by the prosecutor, who was countering appellant’s claim he was a changed man.

##### **B. Ineffective Assistance**

Appellant posits he was denied the effective assistance of counsel. “To establish ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel’s representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation subjected

the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner. 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"

(Citations omitted.) (*In re Wilson* (1992) 3 Cal.4th 945, 950.)

Once again, appellant recasts his prior complaints as examples of ineffective assistance due to counsel's failure to object. In addition, appellant complains counsel did not object when the prosecutor elicited from Officer Serrano his statement to Telles that it was necessary to get appellant off the street before someone else was harmed. Appellant asserts his claim of ineffective assistance can be recognized on appeal because there is no satisfactory explanation for counsel's action. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) As discussed above, we analyzed why appellant's objections would have been overruled even if made as the evidence was properly admitted for various reasons. Even though appellate counsel may disagree with the strategy adopted by appellant's trial counsel, our conclusions constitute a satisfactory explanation of why defense counsel acted as he did given appellant's defense he was a changed man. (See *Strickland v. Washington* (1984) 466 U.S. 668, 690-691 [tactical errors are generally not reversible].) Thus, appellant was not denied the effective assistance of counsel.

Other than notice that trial counsel refused to provide an explanation for his actions, as appellant's petition for habeas corpus relief (B218082) is based on essentially the same instances of ineffective assistance of counsel raised on appeal, we summarily deny that petition.

## **V. Abstract of Judgment**

The court sentenced appellant to a concurrent term on count 3 (assault with a deadly weapon -- the box cutter). Respondent concedes the sentence on that count should have been stayed pursuant to Penal Code section 654. (*People v. Deloza* (1998) 18 Cal.4th 585, 592.)

### **DISPOSITION**

The superior court is directed to modify the judgment and correct the abstract of judgment to reflect the sentence on count 3 is stayed pursuant to Penal Code section 654. The superior court is ordered to prepare and file with the Department of Corrections and Rehabilitations an amended abstract of judgment reflecting that change. In all other respects, the judgment is affirmed.

**WOODS, J.**

**We concur:**

**PERLUSS, P. J.**

**JACKSON, J.**